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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 WESTRIDGE TOWNHOMES OWNERS  
11 ASSOCIATION,

12 Plaintiff,

13 v.

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15 GREAT AMERICAN ASSURANCE  
16 COMPANY, a foreign insurance company, as  
17 successor to AGRICULTURAL  
18 INSURANCE COMPANY; GREENWICH  
19 INSURANCE COMPANY, a foreign  
insurance company,

Defendants.

Case No. C16-1011RSM

ORDER DENYING MOTION FOR  
PARTIAL SUMMARY JUDGMENT

20 This matter comes before the Court on Plaintiff Westridge Townhomes Owners  
21 Association (“the Association”)'s Motion for Partial Summary Judgment. Dkt. #64.  
22 Defendants Great American Assurance Company and Greenwich Insurance Company oppose  
23 the Motion, arguing in part that the Court should reserve ruling on these issues. Dkt #72 at 3.

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25 The Association's Motion asks the Court to determine “[w]hether Defendants have the  
26 burden of proof regarding ‘fortuity’ or, in the alternative, whether the Court should certify the  
27 issue to the Washington Supreme Court.” Dkt. #64 at 3. The Association argues that “courts  
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1 applying Washington law have repeatedly assigned the insurer the burden of proof regarding  
2 the issue of whether the insured knew its loss would occur, *i.e.*, proof of a lack of fortuity...”

3 *Id.* at 4.

4 Defendants raise a procedural issue with this Motion, arguing that:

5 A summary judgment motion must be addressed to the “claim or  
6 defense—or the part of each claim or defense—on which summary  
7 judgment is sought.” Fed. R. Civ. P. 56(a). Here, the Association  
8 does not seek a judgment on fortuity as a claim or defense or as to  
9 some element of a claim or defense. Rather, the Association seeks  
10 a ruling on the general legal question of the burden of proof at trial  
11 on a claim or defense. It might be proper to address this question as  
12 a part of a motion for summary judgment if it could be argued that  
one or the other party had the burden of proof and could not come  
forward with any evidence on the issue, but the Association does  
not claim that such a factual situation exists.

13 Unless the Association can show that a favorable ruling on the  
14 burden of proof would lead to full or partial judgment as a matter  
15 of law in its favor, then the proper place to raise its argument is  
16 when parties argue over the wording of instructions to the jury.  
Reserving ruling until that point would avoid unnecessary rulings  
on general questions of state law and would also give the Court the  
benefit of the full context of the case in which to make its ruling.

17 Dkt. #72 at 3.

18 In Reply, the Association argues that, under Rule 56, there is no question that a party  
19 may move for a ruling on part of a defense. Dkt. #74 at 9 (citing *Hanson v. Safeco Ins. Co. of*  
20 *Am.*, C13-1151JLR, 2014 WL 3752114, at \*4 (W.D. Wash. July 30, 2014)). The Association  
21 argues that “[p]art of resolving Defendants’ fortuity affirmative defense is assigning the burden  
22 of proof,” and that “the proper allocation of the burden of proof presents a purely legal issue  
23 conducive to summary judgment.” *Id.*

24 The Court agrees with Defendants that this Motion is premature. The Association is  
25 requesting the Court to line up, in advance, a favorable portion of a hypothetical ruling on an  
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1 affirmative defense. The Association's Reply brief does little to respond to Defendants'  
2 procedural concerns, and appears to imply that, while the burden of proof is a "purely legal  
3 issue," there could be a factual dispute about this affirmative defense. If so, Defendants are  
4 correct that the proper place to raise such a legal argument would be when parties argue over  
5 the wording of instructions to the jury. If this is not the case, then this issue should be raised in  
6 a forthcoming dispositive motion seeking to dismiss this affirmative defense.  
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8 The Court is also concerned by the Association's apparent legal strategy of filing serial  
9 partial summary judgment motions. *See* Dkt. #50 (an earlier Motion for Partial Summary  
10 Judgment filed by the Association). Under the Court's Local Rules, "[a]bsent leave of the  
11 court, a party must not file contemporaneous dispositive motions, each one directed toward a  
12 discrete issue or claim." LCR 7(e)(3). Although the Association's two Motions are not  
13 contemporaneous, they have been filed before the close of discovery, when the facts would be  
14 in place for a single summary judgment motion to be filed containing all of the legal issues that  
15 the Association believes need to be resolved by the Court. In any event, the Court does not  
16 grant leave for the Association to file contemporaneous dispositive motions.  
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19 The Association requests in the alternative that the Court certify this question to the  
20 Washington State Supreme Court. "The decision to certify a question to a state supreme court  
21 rests in the sound discretion of the district court." *Eckard Brandes, Inc. v. Riley*, 338 F.3d  
22 1082, 1087 (9th Cir. 2003). Certification is appropriate only "[w]hen in the opinion of any  
23 federal court before whom a proceeding is pending, it is necessary to ascertain the local law of  
24 this state in order to dispose of such proceeding..." *Peterson v. Graoch Associates No. 111*  
25 *Ltd. P'ship*, 2012 WL 254264, at \*2 (W.D. Wash. Jan. 26, 2012) (emphasis omitted); *see also*  
26 RCW 2.60.020.  
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1 Certification is unnecessary here, partly because the Association premises its Motion on  
2 the assertion that Washington law is clear on this issue. *See* Dkt. #65 at 6 (“the Washington  
3 Supreme Court has plainly stated that the ‘fortuity’ principle exists under Washington law  
4 solely as the ‘known risk’ defense, which is an issue on which the insurance company bears the  
5 burden of proof.”). More significantly, certification is inappropriate at this time because it is  
6 not “necessary” in order to “dispose of such proceeding” for the reasons identified above. *See*  
7 *Peterson, supra*.

9 Having reviewed the relevant briefing and the remainder of the record, the Court hereby  
10 finds and ORDERS that the Association’s Motion for Partial Summary Judgment, Dkt. #64, is  
11 DENIED.  
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14 DATED this 11 day of December, 2017.

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18 RICARDO S. MARTINEZ  
19 CHIEF UNITED STATES DISTRICT JUDGE  
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